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From the American Law Register for October, 1861.

WRIT

OF

HABEAS CORPUS.

EX-PARTE MERRYMAN.

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PRESENTED BY

President Gilman

[From the American Law Register for October, 1861.]

WRIT OF HABEAS CORPUS.

EX-PARTE MERRYMAN.

A question is presented to the people of the United States, of more interest and importance than any which has arisen since the Constitution was adopted. There are now confined in the fortresses of the Nation a large number of what may properly be called State prisoners. They have been arrested by military power, and are held in custody without any civil process. When the commanders of these forces are served with a writ of habeas corpus, they refuse to comply with it, by direction of the President. The question, therefore, is, are these prisoners lawfully confined, or is it a gross outrage upon their rights of personal liberty? Many persons, even in the States which are still loyal, charge the President with usurpation. Many loyal citizens, though acquiescing in the proceeding as a matter of necessity, still doubt its constitutionality. As the country is now struggling to sustain the Constitution, it is of the utmost importance to demonstrate, as it is believed may be done, that the measures adopted by the Government are strictly within the powers conferred by that instrument. The precise point has never been decided by the court of last resort. But in the case of *ex parte Merryman*, Ch. J. Taney, in an opinion published in the July number of the Register, decided that, in the arrest of Merryman, the President acted without constitutional authority. The high position occupied by this jurist renders this opinion, in the minds of some, conclusive.

On the other hand, the Attorney General has given to Congress an official opinion, in which he clearly justifies the arrest of Merryman, and all others who, in the opinion of the President, are implicated in the rebellion. In support of this view is the unanimous concurrence of the Cabinet, composed of men, many of whom are eminent lawyers, who would not disgrace a position on the bench of the Supreme Court. The Attorney General holds the same position now as the Chief Justice did before his elevation to the bench, and is believed by many to be fully as well qualified for the office. Other distinguished jurists have volunteered opinions on one side or the other. The weight of authority would seem to be, therefore, strongly in favor of the President.

An attempt will now be made to show that the power of the President to do what he has done, is clearly inferrable from the Constitution and the existing laws of Congress; that this view of the subject has been fully sanctioned by the Supreme Court of the United States, and that the Chief Justice himself has advanced propositions that are utterly inconsistent with his decision in the Merryman case, and with the doctrines contained in it.

I. The clauses in the Constitution bearing upon the question are the following:—

ART. 1, SEC. 9.—"The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

ART. 2, SEC. 2.—"The President shall be Commander in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States."

ART. 2, SEC. 3.—"He shall take care that the laws be faithfully executed."

ART. 6.—"All executive officers—of the United States—shall be bound, by oath or affirmation, to support this Constitution."

AMENDMENTS, ART. 5.—"No persons shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service."

LAW OF 1795.—"Whenever the laws of the United States shall be opposed, or the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals in this act, it shall be lawful for the President of the United States to call forth the militia of such State, or any other State or States, as may be necessary to suppress such combination, and to cause the laws to be executed."

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No unprejudiced mind can fail to discover from each and all of these provisions, that the framers of the Constitution, and the Congress which was held a few years afterwards, contemplated a state of things in which civil proceedings must necessarily be superseded by military operations. Military force is to be used because civil process has become ineffectual. It becomes not only the right, but the duty of the President, to call out and use the militia. He is bound by oath to do it. But the right to use this extraordinary power commences when, and not before, the ordinary safeguards of life, liberty and property become ineffectual. This is sometimes called suspending the writ of habeas corpus; but it is a misapplication of language.

The writ has been suspended, if that term is applicable, and the privilege lost, before the President begins to act. How can there be any privilege of habeas corpus when the only officers, judicial or executive, who have anything to do with the writ, either dare not act, or, through treason or rebellion, will not? The right to use military force gives, of course, the right to dispense with civil proceedings. The two forces are totally unlike, and proceed by totally different means. What has a General to do with a bench warrant, and who ever heard of such an officer rendering an account of his conduct to a Judge? The President is commander-in-chief of the army and navy, and what is he to command them to do? Plainly, nothing but to kill or to capture. If his soldiers kill, are they to be tried for murder on an indictment? If they capture, are they to answer to a charge of false imprisonment? The bare suggestion is enough to show the absurdity of such a claim. It is clear, then, that, granting to the President the right to employ a military force, is, *per se*, authorizing him to suspend the writ of habeas corpus, if that term can properly be applied to such a state of things as presupposes the absence of any such writ, and the inability on the part of those claiming the privilege, to use it. It is urged that the Constitution vests this power only in the legislative department. The justness of this claim will be considered hereafter. But suppose it to be correct. The Legislature has vested the power in the President by the law of 1795, above quoted. If, then, there was a

combination in Maryland too powerful to be suppressed by the ordinary course of judicial proceedings, and Merryman was implicated in it, the President was explicitly authorized by Congress to arrest him by military force, and to hold him as a captive.

But the President had this power without the act of Congress. This is clearly to be inferred from several of the clauses which have been referred to, and particularly that which provides that "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety shall require it.

The Attorney General has well remarked that "the Constitution is older than the Judiciary Act." It existed before there were any Judges who could issue a writ of habeas corpus. There was a President before there was or could be any act suspending the privilege of such a writ. There was a time, therefore, in which a rebellion might have taken place, when, if the President had not had the power of arresting the rebels, the Government might have been destroyed. It is not to be presumed that the authors of the Constitution intended to leave the country so exposed.

Where the Constitution provides that the writ shall not be suspended except under certain circumstances, and does not say by whom, the fair inference is, that it refers to those who, for the time being, have the power of violating it. It establishes three co-ordinate branches of the Government: the Legislative, Executive, and Judicial. Why should it be supposed to refer to the Legislative alone? Congress is not in session, on an average, more than one-third of the time. The suspension of the writ is only to take place on a sudden and unexpected emergency, and then as a measure of necessity, to preserve the Government. Such an emergency is twice as likely to occur when Congress is not in session as when it is. Yet it is contended, although the very existence of the Government may depend on the suspension of the writ, that no way is provided by the Constitution for its own preservation. Judges of the Supreme Court have frequently eulogized the sagacity and wisdom of the authors of the Constitution. If such a construction is correct, it does indeed show their sagacity, for the language

proves that they foresaw the danger, but at the same time convicts them of the grossest folly, in not guarding against it. We ought not, therefore, to limit the clause in question to the legislative department unless the reasons for it are conclusive.

But judging from the provisions of the Constitution alone, if the power of suspending the writ is to be restricted to any one department alone, it would naturally be referred to the Executive. It has already been suggested that this department has, for the exercise of power, twice as much time as the Legislative. It is the most active, and is much more likely to come in collision with the personal rights of individuals. The clause in question limits the suspension of the writ to occasions of insurrection and invasion, and it is in times of insurrection and invasion that the military force is to be called out, and put under the control of the Executive. This is certainly a remarkable coincidence; it is virtually saying, that in times of insurrection and invasion the President shall be invested with military power, and then the writ of habeas corpus may be suspended. If it is asked, by whom? the answer is obvious, and the reply would be almost unanimous, "by the President."

But the Chief Justice insists that, although there is not the slightest reference to Congress in the clause in question, yet that it must be regarded as referring to that body alone, because he says that it is found in the first article of the Constitution, and this article "is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department." So far as his opinion is based on the construction of the Constitution, it rests almost entirely on this assumption. If, then, this assertion is erroneous, the whole argument falls to the ground.

A careful examination of the first article will show, beyond a doubt, that it is not confined to the Legislative Department, and that it does in one instance at least refer to the Executive, whereas the whole force of the argument depends upon the exclusiveness of the reference. It does, indeed, treat chiefly of the Legislative Department. But the first clause of section ten of that article is wholly devoted to the prohibition of action in certain cases by the State Governments, and has no reference to Congress. One clause

of Section nine, of the first article, standing in it very near to the clause in question, is in these words:—

"No money shall be drawn from the Treasury, but in consequence of appropriations made by law." Now which department draws money from the Treasury? The Executive, without doubt. To say that Congress shall not draw money from the Treasury without an appropriation, would be to say that Congress shall not make an appropriation without an appropriation, for an act appropriating money is all that it is capable of doing. Here, then, is a clause, in the same section with the one regarding the suspension of habeas corpus, referring, notwithstanding the assertion of the Chief Justice to the contrary, directly to the Executive. Why, then, may not that clause refer to the same department? How illogical to conclude that it does not.

An inference may be drawn in favor of this power of the President, with almost equal clearness, from those clauses which require him to see that the laws are faithfully executed, and that he shall take an oath to support the Constitution. The imposition of this duty necessarily carries with it the right to use whatever means are appropriate and necessary to accomplish this object. This rule is always applied in the construction of powers. The Supreme Court has held, over and over again, that the power to do an act necessarily includes the power to use the appropriate means to do it. Marshall, C. J., says: "The powers given to the Government imply the ordinary means of execution, and the Government, in all sound reason and fair interpretation, must have the choice of the means it deems the most convenient and appropriate to the execution of the power." 4 Wheat. 316; 1 Kent, 252. This doctrine is asserted by that eminent jurist, to apply to the Government, which consists of the Executive, as well as Legislative and Judicial departments. On this ground a great many Acts of Congress have been held to be constitutional, although no explicit power has been given. No good reason can be assigned why it should not be applied to the Executive. If the President plainly sees that he cannot support the Constitution without arresting a rebel, who will otherwise destroy it, is he to do nothing, and witness the loss of that which it is his sworn duty to save?

II. It will next be shown that the Supreme Court of the United States has decided, in a case precisely analogous, that the President has the power to do all that he has done in this case. This was the case of *Luther* vs. *Borden*, 7 How. 1. An attempt was made to revolutionize the State Government in Rhode Island by what was called the Dorr Rebellion. The regular State Legislature declared the whole State under martial law. The State Government, with the assent of the President of the United States, authorized the defendants, as a part of the militia of the State, to break the house of the plaintiff, and arrest him as a rebel. They broke the house, but did not find him; and for this he sued the defendants. The Supreme Court held the defendants justified under this authority of the President. If Luther had been arrested and held in custody, he would have been in the same situation as Merryman. The right to break the house depended entirely on the right to make the arrest. The constitutional and legal authority of the President was merely an extension of the power which he has to suppress insurrection against the General Government, so as to make it apply to insurrections against State Governments. Whatever measures he could adopt with regard to the latter, he could *a fortiori* use as to the former. Chief Justice Taney himself, in giving the decision of the Court, (7 How. 44,) says: "A similar question arose in the case of *Martin* vs. *Wheat*. 12 Wheat. 29. The first clause of the first section of the Act of February 28, 1795, authorizes the President to call out the militia to repel invasion. It is the second clause of the same section which authorizes the call to suppress insurrection against a State Government. The power given to the President in each case is the same, with this difference only, that it cannot be exercised by him in the latter case except upon the application of the Legislature or Executive of the State." Again, he says, (7 How. 44,) "It is true that in this case the militia were not called out by the President; but upon the application of the Governor, under the Charter Government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the General Government to interfere; and it is admitted

in the argument that it was the knowledge of this decision that put an end to the armed opposition to the Charter Government, and prevented any further efforts to establish by force the proposed Constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders, and it should be equally authoritative."

It is clear, then, that in this case the Court held that where there is an insurrection in a State, against the State Government, the President has the right to authorize the use of military force to arrest, without any civil process whatever, any person found in armed opposition to such Government, or aiding or abetting in the insurrection. If this is suspending the writ of habeas corpus, then the Court held directly that the President has such a right, by force of the Constitution and the Law of 1795.

In the same case, the Court also held that the President was the sole judge whether an insurrection existed, and whether the person arrested was implicated in it; and that his decision cannot be revised by a civil tribunal. Ch. J. Taney, (7 How. p. 43,) in giving the decision of the Court, quotes with approbation the language of his predecessor, in *Martin* vs. *Mott*, 12 Wheat. 29: "Wherever a statute gives discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." Again he says, (7 How. p. 43,) "After the President has acted, and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision is right?" "Could the Court, while the parties were actually contending in arms for the possession of the Government, call witnesses before it to inquire which party represented a majority of the people? If it could, then it would become the duty of the Court (provided it came to the conclusion that the President had decided incorrectly) *to discharge those who were arrested or distrained by the troops* in the service *of the United States*, or the Government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the

Constitution of the United States, (alluding to the guarantee to each State against domestic violence) is a guarantee of anarchy, and not of order." Again, he says: "By this act, (the Act of 1795,) the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere, is given to the President." The same doctrine has been repeatedly held by the same Court. 9 How. 615; 16 How. 189.

It is clear, then, that if Luther had been actually arrested and detained, and had applied to the Supreme Court for a writ of habeas corpus, although the circumstances would have made the case more doubtful than Merryman's, the Court would have said it had no power to interfere.

III. It remains now to show that the doctrines advanced by the Chief Justice in the Merryman case, are wholly irreconcilable not only with the decision in the Borden case, but with his own opinions as expressed in giving the decision of the Court in that case. On page 530, Am. Law Reg., vol. 9, he says: "With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, *in any emergency*, or *in any state of things*, can authorize the suspension of the privilege of the writ of habeas corpus, *or arrest a citizen except in aid of the judicial power*." How can this be reconciled with what the Chief Justice said in the Borden case? There the question was distinctly put to him, can the President, to suppress an insurrection, authorize a military officer, directly and not in aid of any civil process, to break open the dwelling-house of an insurgent, and arrest him? He answers, unhesitatingly, Yes. In Merryman's case the same question precisely is put to him, and he says No. There is not a shade of difference between the two cases, except that in one the rebellion was against the State Government, and the other against the United States Government. In the Rhode Island case, it is true, martial law had been proclaimed. But the Chief Justice says, 4 How. 44, "In relation to the Act of the Legislature, declaring martial law, it is not necessary, in the case before us, to inquire to what extent, nor under what circumstances, that power may be exercised by a

State." So that that circumstance made no difference between the cases.

On the same page, 530 Am. Law Reg., the Chief Justice says: "Nor can any argument be drawn from the nature of sovereignty, or the necessities of government, for self-defence in times of tumult and danger. The Government of the United States is one of limited powers." Yet in the *Borden case*, 7 How. 45, he says: "Unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of EVERY Government, essential to the preservation of order and free institutions." A similar comparison of other expressions used by the same Judge in the two cases, will show their utter inconsistency, not only in language, but in spirit.

In the Merryman case, the Chief Justice treats the question as one involving merely the right of the President to act without the authority of Congress, and does not even allude to the law of 1795, although this Act was just as applicable in this as it was in the Borden case, while in the Borden case he considers the Act of 1795 as conferring full authority upon him to do exactly what was done in the Merryman case.

To sustain the proposition that the President has no power of himself to suspend the writ of habeas corpus, the Chief Justice quotes largely from the dicta of English jurists. But these are entitled to but little consideration, as the question turns mainly on the construction of the Constitution of the United States. He quotes also a remark of Judge Marshall; but the case in which it was made did not bring to the attention of the Court, in the slightest degree, the point whether the power of suspending the writ of habeas corpus is vested in the Legislative department alone, and not in the Executive department, under any circumstances. The observation of Judge Story to which he refers, shows that it was a matter of uncertainty with him. These authorities are referred to to show that the President, of himself, has not the power, by the Constitution, to suspend the writ of habeas corpus; but this was not the question. It was, whether the Constitution, *and the Law*

of 1795, vested this power in the President, as the Chief Justice himself held they did in the Borden case.

Lastly. In the Borden case he took the ground distinctly, that a Court could not in any way revise the decision of the President, that such a state of insurrection existed as would justify him in making arrests of the insurgents; whereas a large portion of his opinion in the Merryman case consists of a labored effort to show that the decision of the President was not supported by the situation of Maryland at the time. If he gave the opinion of the Court correctly in the Borden case, he, as a Judge, had nothing to do with that question. If the President had acted erroneously, it was like an erroneous decision of the Supreme Court in a matter within its exclusive jurisdiction. If he acted corruptly, he would be liable to be impeached. In either case, in the language of the Chief Justice, 7 How. 45, "the Courts must administer the law as they find it." But if it had been an open question, the circumstances fully justified the arrest. Johnston was advancing with a rebel army, to take Washington. Merryman aided the advance of this army a hundred times as much by preventing the approach of the United States troops, as he would have done by joining Johnston's army. If the President, then, could send a military force to capture Johnston, why not to capture Merryman? But the Chief Justice says the civil authorities in Maryland had not been applied to. But they knew what had occurred, and had not acted, and how long was the President to wait for them? The civil authorities in Virginia had not been applied to before the President sent an army to capture Gen. Johnston, and it would have been as idle to have attempted to indict Merryman as Gen. Johnston.

The manifest inconsistencies between the opinions of the Chief Justice in the two cases, can be rationally accounted for only on the supposition that, in the excitement of the moment, the Borden case had escaped his recollection. Fortunately the President, by following the principles of that case, has been able, so far, to support the Constitution.

Congress appears to have taken the same view of the subject, for notwithstanding the publication of the decision in the Merryman case, and although many of the members are eminent lawyers, no Act

formally suspending the writ of habeas corpus has been passed, and no power has been conferred on the President differing from that contained in the Act of 1795. Indeed, the fatal consequences which would result from carrying into practical effect the doctrine "that no argument can be drawn from the necessities of Government for self-defence in times of tumult and danger," are so apparent, that the promulgation of it, even from high authority, is productive of no injury. It is like the attempt mentioned by Blackstone, to indict surgeons, under the law of Bologna, against shedding blood in the streets. There would be quite as much propriety in a court martial ordering a soldier to be shot for removing a wounded comrade from a burning building, in violation of a strict order not to remove him under any circumstances. To deny to the General Government the power of self-preservation, would be to disregard a principle that pervades the whole law, and which is the governing rule in the construction of every statute and constitution—*Ut res magis valeat quam pereat.*

For what purpose is such a strict construction to be applied to the suspension of the writ of habeas corpus? It should be done, it is said, to preserve the rights of the people. But those rights depend *on* the Constitution. It would be a strange way of preserving the privilege of the writ of habeas corpus, to so construe the Constitution as to cause its loss. If the Constitution is destroyed, of what use is the privilege?

One consideration seems to have been overlooked in these discussions regarding habeas corpus. What right has any one to the privilege but a loyal citizen? Why should any one trouble himself to secure to a rebel a franchise under a Constitution which he is endeavoring to destroy? By his rebellion he loses his rights of property; why not his rights of liberty? Who but a rebel would extend to a rebel the benefit of a writ which might restore him to a situation in which he could do further mischief?

One decisive objection to the decision in the Merryman case is, that if its doctrines were carried into full effect, Secession would become easy and sure. If the President can use no force except in aid of the judicial power, Secession, however unconstitutional,

is safe. If the prosecuting officer or the Judge in any particular district is a traitor, or if a majority of the people are secessionists, nothing could be done, because there would be no judicial process in aid of which the President could call out the military power. All the prisoners, including those taken in battle, now in the hands of our Government, ought to be discharged, because the writ of habeas corpus, according to the Merryman case, has not been suspended, and not one of them is held under any civil process whatever. It is impossible to make any sound distinction between the capture of a rebel in Maryland by Gen. Cadwallader, and one in North Carolina by Gen. Butler.

Many affect to fear that the President will usurp despotic powers if he is justified in the measures which he has adopted; but there is not the slightest ground for such an apprehension, either with regard to the individual who now occupies the chair of State, or any of his successors. He has no standing army devoted to his interests, and dependent on him for support, to sustain him in any such usurpation. The steps which he has taken were not for his own aggrandizement, but to preserve the institutions of the nation, and among them, the writ of habeas corpus. No man can, in this country, with safety to himself, deprive any one of the privilege of this writ without the approbation of a great majority of his fellow citizens; and if it is ever lost, so long as the Constitution remains, it will be with the full consent of those who are entitled to it.

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